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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 37

MARION L. HOLLAND AND ETHEL E. HOLLAND, *Petitioners*,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners pray that this Court grant rehearing of its decision of December 6, 1954, affirming convictions for income tax evasion for the year 1948.

REASONS FOR GRANTING REHEARING

In its opinion of December 6, 1954, this Court for the first time laid down definitive rules to cover tax evasion prosecutions based upon the net worth method. Petitioners

accept those rules and base this petition upon this Court's misapplication of them.

I. WILLFULNESS

It is respectfully submitted that the rule on "willfulness" should have compelled this Court to reverse and remand, instead of affirming, the judgments appealed from, and that it would have done so were it not for the Court's reliance upon

> (1) a factual misstatement, on page 16 of the opinion, that contradicts on its face the correct and undisputed fact as stated on page 7 of the same opinion;
>
> (2) a second factual misstatement which not only is without foundation in the record but was diligently avoided by the Government in its brief; and
>
> (3) an erroneous instruction to the jury by the trial court, which, by virtue of the above errors, could under no circumstances have been cured.

The principal portion of the Court's opinion upon which this petition depends reads as follows (Opinion, p. 16):

> "*Willfulness Must be Present.*
>
> A final element necessary for conviction is willfulness. The petitioners contend that willfulness 'involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.' This is a fair statement of the rule. Here, however, there was evidence [1] of a consistent pattern of underreporting large amounts of income, and [2] of the failure on petitioners' part to include all of their income in their books and records. Since, [3] on proper submission, the jury could have found that these acts supported an inference of willfulness, their verdict must stand. *Spies* v. *United States*, *supra*, at 499-500."

1. "Consistent Pattern of Underreporting."

The first of two "factual" bases upon which this Court upheld petitioners' convictions with respect to the element of willfulness was "a consistent pattern of underreporting large amounts of income." Presumably the Court was alluding to its footnote 8 which stated that

> "The record indicates that the income of the hotel as reported for 1946 was approximately 12½% of that reported by the previous owner in 1945; in 1947 the ratio was 12%; and in 1948 it was 26%." (Opinion, p. 14).

From this statement the Court evidently concluded that because income reported in ensuing years was substantially *less* than in 1945, it must have been *underreported;* and that because it was less in each of the *three* subsequent years, it was *consistently* underreported. Such conclusion not only is not warranted by everyday experience, since the decline in a proprietor's business[1] cannot and does not imply that he is a tax evader, but, with respect to the case at bar, subjects the petitioners to a extreme form of double jeopardy: the undisputed fact is that petitioners were accused of underreporting income for 1946 and 1947 *and were found not guilty* (Opinion, p. 7). To now ignore their acquittal and reinstate—to imply guilt—evidence upon which the jury deliberated and determined innocence, amounts, in substance, to conviction without trial after aquittal with trial. Yet absent evidence of 1946 and 1947 understatement, what this Court erroneously described as a "pattern" of underreporting is reduced to evidence of one year's under-

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[1] Significant in this connection was the testimony of the prior owner of Holland House that when another bar—The Golden Nugget—opened up in the vicinity in 1946, Holland "lost substantial business as a result" (R. 38, 40).

reporting.[2] And such evidence is no evidence at all under this Court's ruling that "wilfulness . . . cannot be inferred from the mere understatement of income" (Opinion, p. 16).

2. "Failure to Include All Income in Books."

The second "factual" basis relied upon by the Court to show willfulness was "the failure on petitioners' part to include all of their income in their books and records" (Opinion, p. 16). This statement referred to what the Court described as evidence

> "*that the books did not reflect the receipt of money* later withdrawn from the hotel's cash register for the personal living expenses of the petitioners and for payments made for restaurant supplies" (Opinion, p. 14, emphasis added).

The italicized statement is without any basis whatsoever in the record and the Government in its brief declined even to imply it. The evidence did show that the petitioners kept no records of monies withdrawn from the cash registers for personal living expenses. While absolutely true, this proved nothing: there was no evidence that to the extent such monies were withdrawn, the receipts of the register were understated. The Court assumed such a relationship on no evidential basis. There is not the slightest reason to record for income tax purposes monies withdrawn from the registers for personal

[2] It is significant in this connection to note that the only evidence of 1948 underreporting of income is the remote comparison with "that reported by the previous owner in 1945" (Opinion, p. 14n8)—evidence of a character the jury rejected for 1946 and 1947. At the very same time, the Government declined the opportunity for much more current and timely evidence as to Holland House 1948 income when it refused petitioners offer in October, 1949 to permit an agent to stand by the cash registers from day to day and compare receipts with those reported in prior years (R. 89).

living expenses. Such amounts play no part in the computation of taxable income so long as the initial receipts are properly recorded as income. Similarly, with respect to payments for the purchase of restaurant equipment, there was no evidence indicating that to the extent such payments were made the gross receipts had been understated. The evidence showed only that these payments were properly recorded on the petitioners' checkbooks, and that the petitioners had in fact overstated their taxable income by failing to reflect depreciation on the equipment represented by these expenditures (R. 160-161).

Lest any implication of willfulness be drawn from the Court's statement "that the cash register tapes, on which the books were based, were destroyed by the petitioners" (Opinion, p. 14), it should be noted that the term "destroyed" finds no basis in the record. The evidence throughout was to the effect that after the Hollands prepared their daily report for the accountant from the cash register tapes they were "thrown out in the waste basket, as they are just now" (R. 313), since "I have no further use for them" (R. 313, 75, 78). And the record is devoid of any evidence or implication that discarding cash register tapes was an unusual or significant practice, or that it in any way departed from normal custom and practice of proprietors in whose business cash registers are used. Moreover, while the statutes and regulations impose upon taxpayers the burden of maintaining books and records, petitioners are aware of nothing that requires them to keep such items as cash register tapes. Indeed, an inference of willfulness from the mere failure to preserve such tapes is all the more unfortunate and unwarranted in light of the fact that a taxpayer having a fraudulent design would find it no burden to destroy the actual cash register tapes each day and to run off a completely new and false set, and accumulating them.

3. "On Proper Submission."

This Court concluded that "since, on proper submission" the above quoted acts "supported an inference of willfulness," the jury's verdict must stand, citing *Spies* v. *United States*, at 499-500 (Opinion, p. 16). But in light of the petitioners' foregoing analysis showing that the "pattern" of underreporting was no pattern at all, and that the "failure" to include on the books all income received was, in reality, nothing more than the non-recording of non-deductible and thus irrelevant (tax-wise), expenses, the premise of the Court's conclusion, and hence the conclusion itself, dissolved. Reversal on willfulness was thus dictated by the evidence, since as this Court pointed out in the cited portion of *Spies* v. *United States*, 317 U. S., at 500, "if the evidence fails to afford such an inference [of willfulness], the defendant should be acquitted." Moreover, the implication of the Court's language that "upon *proper* submission, the jury *could have* found" willfulness is that this Court realized that the instruction on which the trial court submitted the case to the jury was, in fact, erroneous. Such inference of error is correct. The trial court told the jury:

> "You may infer willfulness if the inference to your mind is reasonable from all the facts and circumstances in evidence. *You may consider Mr. and Mrs. Holland's relationship to each other*, what each did in the business, and all of the acts in evidence that they have committed or failed to commit at any time" (R. 215, emphasis added).

Although the italicized language finds no basis whatever in law, and no attempt was made by the Government to defend it in the four-sentence section on willfulness in its 91-page Brief (pp. 64-65), it apparently carried great weight with the jury which convicted petitioners only for the year 1948, the lone year in which both Mr. and Mrs. Holland were jointly indicted.

II. THE NON-PREJUDICIAL EFFECT ACCORDED THE IMPROPER INSTRUCTION ON "REASONABLE DOUBT" VIOLATES THE SPECIFIC, FUNDAMENTAL AND PRECAUTIONARY STANDARDS TO BE FOLLOWED IN NET WORTH PROSECUTIONS AS PRONOUNCED AND ESTABLISHED IN THE OPINION FOR THE GUIDANCE AND DIRECTION OF APPELLATE AND TRIAL COURTS.

At Page 17 of its Opinion and decision, the Court, in passing upon Petitioners' specification of error, touching and concerning the Trial Court's instruction on "reasonable doubt" characterized it as follows:

> "* * * He [the trial court] defined it as 'the kind of doubt * * * which you folks in the more serious and important affairs of your own lives might be willing to act upon.' We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, * * * rather than the kind on which he would be willing to act. But we believe that the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some. *A definition of a doubt as something a jury would act upon would seem to create confusion* rather than misapprehension. * * *" (emphasis added)

It is respectfully suggested that an instruction which "would seem to create confusion" does not meet the precautionary requirements that:

> "Trial Courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. *Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method*, the assumptions on which it rests, and the inferences available both for and against the accused." (Opinion, p. 6, emphasis added)

The necessity for a clear and proper instruction on reasonable doubt is further emphasized and would seem

to be mandatory by the Court's holding, (Opinion, p. 17) in passing upon the trial court's refusal to instruct the jury upon circumstantial evidence and its nature, that:

> "The better rule is that where the jury is *properly instructed on the safeguards of reasonable doubt*, such additional instruction on circumstantial evidence is confusing and incorrect." (emphasis added)

Thus, in this pure net worth case, the innocence or guilt of Petitioners is adjudicated, on the one hand, without an instruction on the character of circumstantial evidence, and its effect, and, on the other hand, with an improper and confusing instruction on reasonable doubt. Under these circumstances, the hypothesis upon which the "better rule" is premised does not exist. This, we urge, denies to the accused the "safeguards traditionally provided in the administration of criminal justice. * * *" (Opinion, p. 2) in a type of prosecution "so fraught with danger for the innocent that the courts must closely scrutinize its use." (Opinion, p. 3) and by reason of the premises the prejudicial effect of the challenged instruction becomes immediately apparent:—

> "When circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." (Opinion, p. 7)

Over and beyond the serious implications imputed to the challenged instruction hereinabove, we respectfully point up that the effect of the instruction is to increase the degree or character of the doubt which entitles a defendant in every criminal case to a verdict of acquittal from a finding of reasonableness to a finding of positive

innocence. It decreases the burden of proof imposed upon the Government by reducing the quantum of proof required to convict from "beyond a reasonable doubt" to a "preponderance of the evidence". It has the effect of making synonomous the term "reasonable doubt" with the term "preponderance of the evidence", for reasonable men and women in the important transactions of life, act upon a preponderance of fact or circumstance, and, many times, they do so without being fully convinced of the correctness or reasonableness of such a conclusion. In this connection we again suggest, that every Appellate Court, who has had the opportunity to pass upon the specific challenged instruction, has held it to be prejudicial. See: *Commonwealth* v. *Miller*, 139 Pa. 77, 21 Atl. 138; *State* v. *Rover*, 11 Nev. 343; and *People* v. *Remmerly*, 87 Cal. 117, 25 Pac. 266.

III. CONCLUSION

A most important and essential contribution to the safeguarding of defendant's rights in income tax evasion cases was rendered by this Court when it cautioned the trial courts to exercise "great care and restraint" in this type of case "which is so fraught with danger for the innocent that the courts must closely scrutinize its use" (Opinion, p. 3). Petitioners respectfully submit, however, that in sustaining the proof of this case on the evidential basis set forth above, this Court itself departed from those standards to which it has urged adherence by lower courts.

For the foregoing reasons, petitioners request that this Court's opinion and judgment be modified so as, at least,

to order a new trial on the basis of the newly announced principles.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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